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ALEXANDER L. STEVAS,
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No. 82-621

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

TOWN CONCRETE PIPE OF WASHINGTON, INC.,

Petitioner,

v.

LABORERS INTERNATIONAL UNION LOCAL 252

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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LABORERS INTERNATIONAL UNION LOCAL 252

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Laborers International Union Local 252 ("Local 252") and Petitioner Town Concrete Pipe of Washington, Inc. ("Town Concrete") are parties to a collective bargaining agreement. Local 252 represents employees of Town Concrete. The collective bargaining agreement at issue here, effective through June 1,

1980, provides for "final and binding" arbitration over "disputes involving the interpretation or application of this agreement." The agreement includes a cost of living clause providing for annual increases. Those increases are based on a formula tied to the "COL Index (1967 Seattle Area) Base" of the Bureau of Labor Statistics.

In 1978, the Bureau of Labor Statistics announced that it would publish three revised consumer price indexes. In early 1979, Local 252 and Town Concrete negotiated on the effects of the change. Town Concrete took the position that the change in the index eliminated the cost of living clause from the agreement. The parties continued to negotiate and to discuss possible arbitration. Local 252 filed an unfair labor practice charge with the National Labor Relations Board, alleging that Town Concrete unilaterally

implemented its proposal on wage increases. The NLRB's Regional Office refused to issue a complaint.

In 1980 Town Concrete refused to submit the issue of the cost of living clause to arbitration. Local 252 brought this action to compel arbitration under 29 U.S.C. § 301. After cross-motions for summary judgment, the district court granted Town Concrete's motion. The district court held the issue non-arbitrable, citing the agreement's "savings" clause. That clause stated that if a contract provision were "rendered or declared invalid by reason of any existing or subsequently enacted legislation [or court decree], such invalidation of such [provision] shall not invalidate the remaining portions thereof; provided, upon such invalidation the parties signatory hereto agree to meet immediately to

negotiate such parts or provisions affected."

On appeal, the Ninth Circuit Court of Appeals reversed and remanded the district court's decision. It ordered summary judgment for Local 252, compelling arbitration. The Court of Appeals held that the meaning of the cost of living clause was a matter of contract interpretation subject to contractual arbitration. The Court of Appeals stated that the district court, in denying arbitrability, had interpreted two substantive contractual provisions, the cost of living and "savings" clauses. That was improper because a determination of arbitrability must be based on the arbitration clause, said the Court of Appeals, and questions of substantive interpretation are for the arbitrator. The Court of Appeals also concluded that the cost of living clause

was subject to arbitration notwithstanding the prior negotiations.

ARGUMENT

CERTIORARI SHOULD BE DENIED. THE CIRCUIT COURT'S DECISION IS IN HARMONY WITH DECISIONS OF THIS COURT HOLDING THAT DISPUTES INVOLVING CONTRACTUAL INTERPRETATION ARE ARBITRABLE UNLESS EXPRESSLY EXCLUDED BY THE PARTIES' CONTRACT.

A. The Court of Appeals Correctly Distinguished Between Which Contract Provisions A Court Can Examine In Determining Arbitrability And Which Provisions Are Subject To The Parties' Agreement To Arbitrate.

The holding of the Court of Appeals below is proper and in harmony with this Court's, and circuit courts', decisions upholding arbitrability. The seminal cases which set forth a liberal arbitrability doctrine are the Steelworkers' Trilogy, decided in 1960. The role of a court in a suit to compel arbitration is strictly confined to determining "whether the reluctant party did agree to arbitrate

the grievance." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). This Court went on to set the standard for ordering arbitration, 363 U.S. at 582-83:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Such positive assurance that a dispute is not arbitrable can be evidenced by a specific exclusion. However, in the "absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." 363 U.S. at 584-84.

The Court of Appeals correctly determined here that the arbitration clause is the determinant of arbitrability of the cost of living clause dispute. The

savings clause stressed by Petitioner does not exclude any dispute from arbitration. Indeed, as the Court of Appeals recognized, the interpretation of the savings clause itself should be subject to arbitration. It is a contractual provision covered by the broad arbitration clause.[1/]

Interpretation of that savings clause, in terms of whether the revisions by the Bureau of Labor Statistics were

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1/ Petitioner argues that the Court of Appeals' failure to examine other contractual clauses in determining arbitrability conflicts with its own holding in Haig - Berberian v. Cannery Warehousemen, 535 F.2d 496 (per curiam 9th Cir. 1976). There is in fact no conflict. Haig - Berberian held that evidence which went "to the meaning of the substantive clause upon which the merits of the dispute depended," rather than to the meaning of the arbitration clause, was a matter for the arbitrator. 535 F.2d at 499-500. In the instant case, the "savings" clause deals with the merits of the dispute over the cost of living clause, not with the arbitration clause.

"legislation" and whether they "invalidated" the cost of living provision, is a dispute which Town Concrete agreed to refer to arbitration when it signed the agreement. 2/ As this Court stated in another case, "By their contract the parties clearly expressed their preference for an arbitral, rather than a judicial, interpretation of their obligations under

2/ Petitioner asks as one of the Questions Presented whether the Court of Appeals erred in "holding that actions by the United States Bureau of Labor Statistics are not 'legislation' within the meaning of the [savings clause of the] collective bargaining agreement" (Petition, p. 3). Petitioner recognizes the court's discussion as dicta (Petition, p. 12). Petitioner's question itself, phrased as "within the meaning" of the agreement, is proof that the question requires interpretation of a substantive term of the contract. That is within the province of the arbitration clause. Regardless, it is difficult to conceive how changes in the Bureau's indices are "enacted legislation," conceding that the Bureau was formed as a result of Congressional act.

the collective bargaining agreement." Nolde Bros. Inc. v. Bakery Workers, 430 U.S. 243, 253 (1977), reh. den. 430 U.S. 988 (1977). Even if there were a doubt as to arbitrability, under this Court's decisions it must be resolved in favor of arbitration.

The Court of Appeals realized that to deny arbitrability in this action would be to effectively interpret the terms of two substantive contractual provisions, the "savings" and cost of living clauses. Such a denial, which Petitioners urge, would be in direct conflict with the expansive arbitrability doctrine of the Steelworkers Trilogy. Arbitrators, not courts, are to interpret substantive contractual terms under arbitration clauses such as the one here.

There is no conflict between the decisions below and the decision of the Third Circuit in RCA v. Association of

Scientists, 414 F.2d 893 (3rd Cir. 1969). In that case, the court looked beyond the same type of arbitration clause as in the instant case only to see if a layoff procedure was a term of the contract. It was not. 414 F.2d at 897. Since there was no layoff procedure term in the contract, a procedure instituted by the employer could not be arbitrated. That is not inconsistent with the Court of Appeals holding below. The "savings" and cost of living clauses were clearly terms of the contract. The Third Circuit in RCA did not look beyond the arbitration clause to find exclusions, but rather to see if a dispute fit the clause's definition of an arbitrable dispute. Here, there is no contention that the dispute was not in the arbitration clause's definition to begin with.

There is no reason to grant the petition for a writ of certiorari. The

decision of the Court of Appeals comports with the arbitrability mandate of the Steelworkers Trilogy and does not conflict with the decisions of this Court or decisions of the other courts of appeal.

B. The Court Of Appeals Correctly Found No Issue Of Waiver Here. If There Had Been Such An Issue, It Would Have Been For The Arbitrator To Hear.

The Court of Appeals found there was no waiver of arbitrability brought about by the parties' attempts to negotiate the cost of living clause. The clause still existed and was subject to arbitration under the reasoning of the Steelworkers Trilogy, although it was "at worst, difficult to interpret" (Petition, p. A-12). That finding is consistent with the Steelworkers principle that a court should not preempt the functions of the arbitrator. As this Court stated, the function of a court "is confined to ascertaining whether the party seeking

arbitration is making a claim which is on its face governed by the contract. . . . The courts, therefore, have no business. . . considering whether there is equity in a particular claim." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960).

Thus, even if there were an issue of waiver here, that would be an issue for the arbitrator. It would be an equitable defense to arbitration and it would not affect the coverage of the arbitration clause. This Court has held that such "defenses" and related issues are so closely tied to the substantive aspects of arbitrability matters that they should all be decided by an arbitrator. Cf. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) ("procedural" questions growing out of a dispute are for the arbitrator to decide; it best accords "with the policy

behind federal labor law to regard procedural disagreements not as separate disagreements but as aspects of the dispute which called the grievance procedures into play," 376 U.S. at 559); International Union of Operating Engineers v. Flair Builders, Inc., 406 U.S. 487 (1972) (a defensive claim of laches in opposition to arbitration was a dispute within the arbitration clause).

Local 252's actions in discussing and negotiating the effects of the price index change on the cost of living clause, and its bringing that matter before the NLRB when the Petitioner instituted its view of the effects, are consistent with national labor policy. That policy is designed to encourage the discussion and settlement of controversies as they develop in order to avoid industrial strife. Local 252 was seeking a peaceful solution to the questions raised by the price index change in

its earlier actions, just as it was when it instituted this action to compel arbitration. Those actions should not be seen as a waiver of arbitration. Rather, just as arbitration is the culminating step for grievances which cannot be settled in other ways, it is the final step for this dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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